OAH 58-3100-22322-2

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE DEPARTMENT OF VETERAN AFFAIRS

David S. Doering, Petitioner

v.

Minnesota Department of Transportation, Respondent

And

Fredrick G. Sasse, Petitioner

v.

Minnesota Department of Transportation, Respondent

RECOMMENDATION ON THE SUMMARY DISPOSITION MOTION OF THE DEPARTMENT OF TRANSPORTATION

This case arises out of the State shutdown, which began on July 1, 2011. As of that date, most State employees were laid off. The shutdown occurred because the State had not approved an operating budget for the biennium commencing July 1, 2011. The budget issue was subsequently resolved, and State employees, including the Petitioners, returned to work on July 21, 2011, once funding was approved.

The Petitioners are employees of the Minnesota Department of Transportation (MnDOT) who were laid off during the shutdown. Each of the Petitioners filed a Petition for Relief under the Minnesota Veterans Preference Act (VPA) regarding their layoffs. Both contend that their layoffs resulted from the State's lack of good faith in failing to enact a biennial budget. Both further contend that, although their jobs were deemed critical, they were not called to work during the shutdown, and other MnDOT employees performed their work.

On September 26, 2011, the Department of Veteran Affairs filed a Notice of and Order for Pre-Hearing Conference with the Office of Administrative Hearings, forwarding the Petitions for hearing. The undersigned Administrative Law Judge (ALJ) conducted a prehearing conference on October 11, 2011.

By an Order dated October 12, 2011, the ALJ set dates for the Petitioners and MnDOT to file legal arguments in support of their positions. The Petitioners filed their arguments on October 31, 2011. In response, MnDOT filed a motion for summary disposition.

Based on the filings and records herein, and the arguments of the Parties,

IT IS HEREBY RECOMMENDED THAT:

1. The Department of Veteran Affairs **GRANT** MnDOT's motion for summary disposition**.**

2. The Department of Veteran Affairs **DENY** Petitioners' requests for relief under VPA.

Dated: December 9, 2011

s/Linda F. Close
LINDA F. CLOSE
Administrative Law Judge

NOTICE

This report is a recommendation, not a final decision. The Commissioner of Veterans Affairs will make the final decision after a review of the record and may adopt, reject or modify these Findings of Fact, Conclusions, and Recommendation. Under Minn. Stat. § 14.61, the Commissioner shall not make a final decision until this Report has been made available to the parties for at least ten days. The parties may file exceptions to this Report and the Commissioner must consider the exceptions in making a final decision. Parties should contact the Commissioner of Veterans Affairs, Veterans Service Building, Minnesota Department of Veterans Affairs, 20 West 12th Street, Second Floor, St. Paul, Minnesota 55155-2006, to learn the procedure for filing exceptions or presenting argument.

If the Commissioner fails to issue a final decision within 90 days of the close of the record, this report will constitute the final agency decision under Minn. Stat. § 14.62, subd. 2a. The record closes upon the filing of exceptions to the report and the presentation of argument to the Commissioner, or upon the expiration of the deadline for doing so. The Commissioner must notify the parties and the Administrative Law Judge of the date on which the record closes.

Pursuant to Minn. Stat. § 14.62, subd. 1, the Commissioner is required to serve its final decision upon each party and the Administrative Law Judge by first class mail.

MEMORANDUM

Issues Presented

The Petitioners request relief under the VPA. They assert that the State's failure to enact funding for the biennium, resulting in the shutdown, was not done in good faith. They further maintain that they, rather than other employees, should have been recalled to perform critical services during the shutdown, because the VPA required that result.

Summary Disposition Standard

Summary disposition is the administrative equivalent of summary judgment.[1] Summary disposition is appropriate when there is no genuine dispute as to the material facts of a contested case, the law applied to those undisputed facts clearly favors one of the parties.[2] The moving party carries the burden of proof to establish that there are no genuine issues of material fact that would preclude disposition of the case as a matter of law.[3] Further, when considering a motion for summary disposition, the tribunal must view the facts in the light most favorable to the nonmoving party.[4] If reasonable minds could differ as to the import of the evidence, judgment as a matter of law should not be granted.

In order to defeat an otherwise proper motion for summary disposition, the non-moving party must show the existence of material facts that are genuinely disputed.[5] A genuine issue is one that is not either a sham or frivolous and a material fact is a fact whose resolution will affect the result or outcome of the case.[6]

Undisputed Facts

The Petitioners are veterans who were honorably discharged from military service. Both are employed by MnDOT. By a memorandum dated June 10, 2011, the Petitioners received from Minnesota Management & Budget (MMB) a notice about a potential layoff in July. Funding for the coming biennium had not been approved, and a shutdown was anticipated. The MMB notice informed Petitioners they would be laid off unless MnDOT told them they should report to work to perform critical services.[7]

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[1] *See Pietsch v. Mn. Bd. of Chiropractic Examiners,* 683 N.W.2d 303, 306 (Minn. 2004).

[2] *See Sauter v. Sauter,* 70 N.W.2d 351, 353 (Minn. 1955); *Carlisle v. City of Minneapolis,* 437 N.W.2d 712, 715 (Minn. App. 1988).

[3] *See Theile v. Stich,* 425 N.W.2d 580, 583 (Minn. 1988).

[4] *See Fabio v. Bellomo,* 504 N.W.2d 758, 761 (Minn. 1993); *Ostendorf v. Kenyon*, 347 N.W.2d 834, 836 (Minn. App. 1984).

[5] *See Murphy v. Country House, Inc.,* 240 N.W. 2d 507, 511-12 (Minn. 1976); *Borom v. City of St. Paul,* 184 N.W.2d 595, 597 (Minn. 1971).

[6] *See, e.g., O'Malley v. Ulland Bros.,* 549 N.W.2d 889, 892 (Minn. 1996).

[7] Affidavit of Karin Van Dyck (Van Dyck Affid.), Ex. A (attached to the Respondent's Notice of Motion and Motion for Summary Disposition).

MnDOT did not recall the Petitioners to work during the shutdown. They returned to work on July 21, 2011, to the same positions they held prior to the shutdown. The Petitioners returned at the same rate of pay and with the same benefits they had before the shutdown. In accordance with memoranda of understanding with state employee associations, the State paid health insurance premiums for the Petitioners and others during the shutdown.[8]

The Petitioners contend they are entitled to relief under the VPA because their layoffs were not done in good faith. They further argue that their jobs were deemed critical, but that other State employees performed this critical work in their stead. They assert, by implication, that the VPA protects veterans from having other employees perform their critical job functions during a shutdown. Finally, Petitioner Doering asserts that because highway work is partially funded by federal funds, money was available to pay MnDOT employees during the shutdown.

MnDOT asserts that VPA does not apply to this case because the Petitioners were not removed from their jobs within the meaning of the VPA. Further, VPA is inapplicable to MnDOT's decision not to recall the Petitioners during the shutdown, inasmuch as the recalled workers engaged in temporary work. Finally, MnDOT maintains that its layoff of the Petitioners was done in good faith.

Apparent in the Petitioners' pleadings is their genuine frustration with the State's resorting to a shutdown before enacting a budget for the biennium. While acknowledging the sincerity with which the Petitioners argue their case, the ALJ concludes that the law clearly supports the position of MnDOT, rather than that of the Petitioners, as explained below.

The Veterans Preference Act

Disposition of this matter necessarily begins with the VPA. Minn. Stat. § 197.46 provides:

> No person holding a position by appointment or employment in the several counties, cities, towns, school districts and all other political subdivisions in the state, who is a veteran separated from the military service under honorable conditions, shall be **removed** from such position or employment except for incompetency or misconduct shown after a hearing, upon due notice, upon stated charges, in writing.[9]

The protections of the VPA have existed in Minnesota since 1907.[10] The VPA was inspired by the Legislature's conviction that veterans have earned preference in public employment by virtue of their having served this country in times of peril.[11] Over

[8] Van Dyck Affid. ¶ 4, 6.
[9] Minn. Stat. § 197.46 (emphasis added).
[10] *See* Act of Apr. 19, 1907, ch. 263 §§ 1, 2, 1907 Minn. Laws 355.
[11] *See Winberg v. University of Minnesota*, 499 N.W. 2d 799 (Minn. 1993).

the years, the Supreme Court has had many occasions to consider the aims and effects of the VPA. From the cases, three key principles emerge.

First, the VPA is intended to limit the grounds on which a public employer may terminate the employment of a veteran, so that arbitrary removal of a veteran cannot occur. A termination must be "for cause"[12] or, as phrased in the VPA, may occur only upon a showing either of misconduct or incompetence.[13] To these two statutory bases for termination, judicial precedent has created a third basis. A public employer may abolish a veteran's position if the action is taken in good faith.[14]

Second, notwithstanding the VPA, public employers maintain the right to control their own administrative affairs. Thus, for example, the VPA does not restrict the right of a public employer to create temporary employment positions that are not subject to VPA.[15] Similarly, a public employer may reclassify a position as an exercise of its administrative authority, as long as the decision to reclassify is one of substance and not mere form.[16]

Third, an employee is not considered "removed" from employment merely because the employee experiences a work stoppage. Although the statute does not define the term "removal," the Court's decisions illuminate that term. The Court regards a demotion, for example, as a removal.[17] The same is true of placing a veteran on indefinite medical leave.[18] But a suspension is not a removal, because a suspension contemplates a return to work following the period of suspension. Suspension is thus distinguished from dismissal, in that the latter entails a complete end of employment.[19] The Court has expressly held that "a veteran is removed from his or her position or employment when the effect of the employer's action is to make it unlikely or improbable that the veteran will be able to return to the job."[20]

The Petitioners Were Not Removed From Their Positions

Applying this law to the undisputed facts of this case leaves no doubt that the Petitioners were not removed from their positions. The layoff notice received by the Petitioners explained that they were being placed on an unpaid leave of absence,

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[12] *Gorecki v. Ramsey County,* 437 N.W. 2d 646, (1989).
[13] Minn. Stat. § 197.46.
[14] *See Young v. City of Duluth*, 386 N.W. 2d 732, 738-9 (Minn. 1986).
[15] *Crnkovich v. Independent Sch. Dist. No. 701, Hibbing*, 273 Minn. 518, 141 N.W.2d 284 (1966) (seasonal employment as a carpenter is not governed by VPA); see also *McAfee v. Department of Revenue,* 514 N.W. 2d 301 (Minn. App 1994) (VPA does not apply to a temporary, unclassified attorney position).
[16] *Myers v. City of Oakdale,* 409 N.W. 2d 848 (Minn. 1987); *see also Taylor v. City of New London,* 536 N.W.2d 901 (Minn. App. 1995), rev. denied Oct. 27, 1995.
[17] *Leininger v. City of Bloomington*, 299 N.W. 2d 723, 726 (Minn. 1980).
[18] *Myers*, 409 N.W.2d at 851.
[19] *Wilson v. City of Minneapolis*, 283 Minn. 352, 354, 168 N.W.2d 19, 22-23 (1969).
[20] *Myers,* 409 N.W.2d at 850-51.

unless their positions entailed "critical services." The notice explained that some employees might be recalled to perform these critical services during the shutdown.[21]

Prior to the shutdown, the State entered into memoranda with the various employee associations to ensure no interruption of State employees' health insurance benefits during the shutdown. When the State shutdown occurred, the Petitioners were laid off. During the three-week shutdown, the Petitioners surely understood that the shutdown was temporary, and that they would be recalled to their positions when the budget issues were resolved. The State, after all, continued to pay their health insurance premiums, an action that forcefully speaks to the State's intention to retain the Petitioners as employees. It was never likely or probable during this period that the Petitioners would be unable to go back to work. On July 21, 2011, the Petitioners each returned to the exact positions they held before the shutdown. Their salaries and benefits remained unchanged.

Under these circumstances, the ALJ concludes that the Petitioners were not "removed" from their positions under the VPA. And removal is the trigger for relief under the VPA. Because there was no removal, there can be no relief under the VPA.

The Petitioners' Positions Were Not Abolished

The Petitioners have pled the State's lack of "good faith" in shutting down its operations for a three-week period. Their assertion may stem from the MMB layoff notice, which advised the Petitioners that they had rights under the VPA and that the issue at any hearing they requested would be whether the layoff was "done in good faith and for a legitimate purpose."[22]

To the ALJ's knowledge, the Court has applied the good faith grounds for dismissal only when a public employer has abolished a veteran's position. None of the cases apply the analysis to a removal, much less a temporary layoff, especially one involving the entire State workforce. The good faith analysis comes into play when a public body eliminates an individual veteran's position as a sham, when the real purpose is to terminate the veteran's employment.

It cannot be seriously contended that the shutdown was a ruse to deprive the Petitioners of three-weeks' pay. A relatively small number of State employees were recalled to perform critical services during the shutdown.[23] Thus, veterans and non-veterans alike suffered the effects of the absence of State funding.

Apart from the "good faith" language in the VPA notice portion of the MMB layoff notice, nothing in the layoff notice suggests that the Petitioners' positions were being abolished and, indeed, the positions were not abolished. On July 21, 2011, each

[21] Van Dyck Affid. Ex. A.
[22] Van Dyck Affid. Ex. A.
[23] Petitioner Doering provided a list of ten MnDOT employees who worked part time in his job classification during the shutdown. Petitioner Sasse did not know who worked in his job classification.

Petitioner returned to the exact position he occupied prior to the layoff. For these reasons, it must be concluded that the State did not act in bad faith by shutting down.

The VPA Does Not Apply to the Creation of Temporary Positions

The Petitioners assert that, during the shutdown, other employees performed job duties in the same job classification as their own. The Petitioners contend that MnDOT should have recalled the Petitioners, not others, to perform this work during the shutdown. They maintain that the VPA's provisions required MnDOT to do so.

The Petitioners imply that MnDOT should have engaged in the same VPA hiring process for critical positions during the shutdown that it would have used during the ordinary hiring process. The statutory hiring process requires a competitive open examination and an award of points to veterans in that process.[24]

The decision to recall certain workers to provide critical services could not, by its nature, be a hiring process under the VPA. There was no open examination or any lengthy hiring process. Critical services had to be performed, and they were performed by those recalled by MnDOT.

The case law, once again, does not support the Petitioners' position that the VPA provides them with relief. Under judicial precedents, the VPA does not apply to a public employer's decision to create temporary work. A public employer may, even on a regular basis, hire seasonal, hourly workers without regard to the VPA.[25] It follows that a public employer may, on a temporary basis, recall employees for critical work during a shutdown.

It is axiomatic that the job performed by others in the Petitioners' job classification during the shutdown was temporary: the Petitioners returned to their exact same jobs on July 21, 2011. They did so at the same salary as before the shutdown. The Petitioners lost three weeks of compensation, which is not insignificant. But nothing had otherwise changed with respect to their jobs when they returned. That is precisely because other MnDOT employees did that work on a temporary basis only.

Availability of Federal Funds Is Not Dispositive in This Matter

The potential for federal and other funding is central to the Petitioner's arguments about the State's lack of good faith. The ALJ has rejected this argument of the Petitioners because the good faith analysis applies only when a veteran's position has been abolished, as discussed above. But the ALJ also rejects the federal funding argument because it is not pertinent in a case brought under the VPA.

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[24] *See* Minn. Stat. §§ 197.455, subd. 2; 197.455, subd. 4.

[25] *See Crnkovich*, 273 Minn. at 518, 141 N.W.2d at 284 (seasonal carpenter); *McAfee,* 514 N.W. 2d at 301 (temporary, unclassified attorney position).

MnDOT is an executive branch agency subject to the Governor's control. Prior to the shutdown, the Governor, as the State's chief executive, assembled a task force to plan for emergency funding of State services in the event of a shutdown. The task force recommended that only critical core functions of government should be funded during a shutdown.[26] The task force did not recommend that funding be based on the availability of federal or other monies. It focused on critical government functions.

On June 15, 2011, the Attorney General commenced an action in the Ramsey County District Court to ensure that the critical State functions identified by the task force would be funded during the shutdown. In that action, the Governor provided the District Court with the task force's recommendations for state agency funding. The District Court adopted those recommendations, for the most part.[27]

In presenting the task force's recommendations, the Governor did not ask the court to allow funding for all of MnDOT's work. He asked only that emergency highway repair, aeronautic navigation, emergency communication networks, truck permitting, and incident command and support for critical services be funded.[28] Those were the activities that received funding under the Court's order.

The VPA does not constrain administrative planning for an emergency like a shutdown, particularly when that planning has been ordered by a court. The Petitioners, had they been the emergency planners, may have devised a different plan than the one recommended by the Governor and ordered by the Court. But the existence of alternatives for providing State services during the shutdown does not prove a violation of the VPA. On the contrary, the existence of alternatives exemplifies the rationale for the Supreme Court's decisions allowing a public body to administer its affairs without running afoul of the VPA.[29] For these reasons, the ALJ rejects the Petitioners' argument about the availability of federal funds.

Conclusion

The VPA does not provide relief for the Petitioners under the circumstances of this case. During the State shutdown, the Petitioners were not removed from their positions within the meaning of the VPA, nor were their positions abolished, so as to trigger a good faith analysis under the VPA. The failure of MnDOT to recall the Petitioners to perform critical services did not violate the VPA because those performing critical services were temporary workers. Federal funding is not at issue in this matter because the District Court authorized limited funding and expenditures for MnDOT and other agencies during the shutdown. For all these reasons, the ALJ recommends the Commissioner of Veteran Affairs grant MnDOT's motion for summary disposition.

L. F. C.

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[26] *In re Temporary Funding of Core Functions of the Executive Branch of The State of Minnesota,* 62-CV-11-5203 (District Court, Second Judicial District, June 29, 2011) ¶ 7.
[27] *See id.* at ¶ 28.
[28] *See id.* at Petitioners' Appendix 145.
[29] *See* footnotes 16-17, *supra*.